Supreme Court, U.S.
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No. 96-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL G. THOMASSON,

Petitioner,

v.

WILLIAM J. PERRY, Secretary of Defense, and
JOHN H. DALTON, Secretary of the Navy,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. Respondents Implicitly Concede that the Decision Below Merits this Court's Review.

In many respects, respondents' brief in opposition grudgingly acknowledges that the decision below merits this Court's review. Respondents concede that this case squarely presents "important" constitutional issues. Opp., 10, 20. They further concede that the court of appeals fractured severely, in three different directions, in its analysis of those issues, and they acknowledge that a large majority of that court—10 out of 13 judges—found the DoD Directive at issue "invalid" and respondents' arguments and construction of the Act unpersuasive. *Id.*, 9-10 & n.3, *see also id.*, 20 n.9.[1] Indeed, respondents argue, as they must, that the views of these 10 judges are erroneous. *Id.*, 10-19, 20 n.9.

Respondents also admit that numerous lower courts are presently grappling with the important issues that this case presents and that "this Court's review may well be warranted" if and when, perhaps within a matter of weeks, a "circuit conflict should develop." *Id.*, 20-21.[2]

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[1] These 10 judges are the six judges in the concurring group and the four dissenters. *See* Pet., 13-16. The dissenters rejected respondents' argument that the Act and Directive are legitimately based on "conduct" and would have held the policy unconstitutional. *Id.*, 74a-75a, 82a-85a. The concurring group similarly rejected respondents' argument that the policy is "conduct-based;" they, too, agreed with petitioner that the Act (though not the Directive) focuses on speech and sexual orientation per se. *Id.*, 36a-37a, 47a-49a. Unlike the dissenters, however, the concurring group found this legislative focus permissible.

[2] On October 3, 1996, after the filing of respondents' brief in opposition, the Eighth Circuit issued its decision in *Richenberg v. Perry*,

Respondents argue, however, that review is not warranted at this time because the "thorough and persuasive opinions" of the Fourth Circuit in this case and the Second Circuit in *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996), "should resolve any uncertainty as to the validity of the challenged policy." Opp., 20.

Respondents' concessions belie their argument. The issues at stake are of exceptional constitutional importance, and the need for guidance and clarification from this Court is apparent and urgent.

II. Respondents' Argument that the Policy Is Legitimately "Conduct-Based" Is Untenable.

Respondents' chief argument against review is that their policy is indisputably valid because it imposes a legitimate "conduct-based classification." Opp., 10. Specifically,

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No. 95-4181, 1996 U.S. App. LEXIS 26017 (8th Cir. Oct. 3, 1996). There, a divided panel affirmed the discharge of an Air Force Captain who stated that he is gay in an apparent effort to force his discharge and avoid further military service. 1996 U.S. App. LEXIS 26017, at *7-8. The *Richenberg* court began by rejecting the conclusion of the concurring group in this case that the DoD Directive is invalid; the court found that the Act's definition of "propensity" is "ambiguous" and that it has been "permissibly construed" by the Directive to denote a *likelihood* that one will engage in prohibited conduct. *Id.*, at *10 n.4. The court then agreed with the majority opinion in this case (and disagreed with the concurring and dissenting groups below) in concluding that the policy is properly based on "conduct." *Id.*, *13. In dissent, Chief Judge Arnold concluded that Richenberg was improperly discharged solely for acknowledging his sexual orientation. Specifically, he concluded that, if "propensity" means "likelihood," then the Act's presumption of misconduct was applied to Richenberg in an irrebuttable manner because the record could not support a finding that he was "likely" to engage in a forbidden act. *Id.*, *22-29. Petitioner submits that *Richenberg* only adds to the confusion in the lower courts.

they contend that the policy is constitutional (and merits only rational-basis review) because it represents the permissibly "preventive" regulation of lawfully forbidden homosexual conduct. *Id.*, 7-8, 10-19. This argument, which was rejected by a substantial majority of the court below, is not supported by the record and is inconsistent with the plain terms of the Act, the pertinent legislative history, and the policy's "unit cohesion" rationale.[3]

1. The record establishes that respondents proceeded against petitioner solely on the basis of his speech and the mere fact that he said he is gay; it can support no other conclusion. *See* C.A. App. at 358-59, ¶¶ 97-100.[4] Over the course of his ten-year Navy career, petitioner's conduct and performance were beyond reproach, and the Navy has never suggested otherwise; rather, it has conceded this fact.[5]

2. The plain terms of the Act and Directive also establish that they are designed to target the mere verbal disclosure of a homosexual orientation. Under the policy,

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[3] Respondents' interpretation of the Act was unequivocally endorsed by only three of the judges below: Chief Judge Wilkinson, who authored the majority opinion, and Judges Murnaghan and Niemeyer, the only other members of the majority who did not also join Judge Luttig's separate concurrence. The views of the concurring group are somewhat confusing because all six members of this group also joined in the majority opinion.

[4] Throughout the administrative process, the Navy confirmed that it was proceeding against petitioner, and ultimately discharged him, "based on your statement that you are 'gay' which is defined as homosexual conduct." C.A. App. at 58; *see also* Pet. App., 112a, 114a.

[5] *See, e.g.*, C.A. Br. for App'ees at 7 (petitioner "consistently received the highest performance ratings" over the course of his career).

the statement that one is gay or lesbian is, without more, a ground for discharge. Pet. App., 122a, 135a-36a.

Respondents argue that the policy targets such statements only because they evidence a "propensity" to engage in "homosexual acts," and the Directive defines the term "propensity" to mean "likelihood." This argument is unavailing. First, it represents a candid admission that the policy burdens speech and orientation per se and is not a narrowly tailored conduct regulation: the policy focuses on the *disclosure* of a sexual *propensity*, not on the commission of any prohibited act. Opp., 12.[6] Moreover, respondents already have sufficient (and evenhanded) regulations for sexual misconduct.

In addition, as one court has explained, there is no rational basis on which to presume "that an undetected homosexual has no propensity to engage in homosexual acts and presents no risk of undermining the military mission by engaging in prohibited homosexual conduct, while a declared homosexual does have such a propensity and does present such a risk." *Dahl*, 830 F. Supp. at 1334 (noting

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[6] *See Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1477-78 (9th Cir. 1994) (finding respondents' pre-1994 policy suspect on similar grounds); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 918-20 (W.D. Wash. 1994) (holding respondents' pre-1994 policy unconstitutional on similar grounds), *appeal dismissed as moot*, No. 94-35674 1996 U.S. App. LEXIS 26298 (9th Cir. Oct. 7, 1996); *Dahl v. Secretary of the U.S. Navy*, 830 F. Supp. 1319, 1334-35 & n.17 (E.D. Cal. 1993) (same); *cf. United States v. Robel*, 389 U.S. 258, 263-68 (1967) (national security statute that imposed "guilt by association" and required no particularized showing of threat of harmful conduct violated First Amendment).

government's "untenable position" on this point).[7] As that court also pointed out, there is no justification for "singl[ing] out homosexuals for discharge absent any evidence of prohibited conduct, while heterosexuals are not discharged until prohibited conduct has occurred and been proven." *Id.* at 1335. Similarly, as we have shown, a nominal "homosexual" and "heterosexual" who engage in the same forbidden "homosexual act" are not equally likely to be discharged. *See* Pet., 19-20 & n.9; *see also Meinhold*, 34 F.3d at 1478 n.11 (holding that pre-1994 policy "[wa]s not wholly rational" for this reason). If homosexual "conduct" were truly what the policy intended to regulate, these distinctions would not exist.

The policy thus cannot be said to impose an incidental restriction on speech as a preventive measure against forbidden conduct. Gays and lesbians may serve in any duty station in the armed forces—and may even engage in certain conduct that makes their orientation apparent (*see* Pet. 20, 157a-58a)—so long as they do not verbally state who they are.[8] Under the "Don't Tell" regime, speech and

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[7] In any event, no evidence was presented in this case to show that petitioner is "likely" to violate any military rule of conduct.

[8] *See* Opp., 5; Pet. App., 135a ("A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct," which is defined to include the statement that one is gay). This provision, which is a concession that gays and lesbians serve effectively, distinguishes the present policy from the prior policy and undermines respondents' effort to rely on cases upholding the prior policy on grounds that the two are "substantially similar." Opp., 11 n.4. This provision also disposes of the asserted need to prevent homosexuals and heterosexuals from sharing the same facilities (*id.*, 15); policymakers plainly rejected any such argument. Finally, given this provision, the statement "I am gay" is not evidence of any offense. *Compare* Pet., 83a *with* Opp., 19.

speech alone is the disqualifying factor.

3. Respondents also claim that their conduct-based interpretation of the Act is supported by the legislative record, which they assert is owed "great deference" (Opp., 11) and shows that policymakers gave this matter "extensive review" (*id.*, 1). This claim lacks force for two reasons.

a. First, the immediate legislative record surrounding the Act disproves any contention that the policy is legitimately "conduct-based:" the currently proffered "unit cohesion" rationale has nothing to do with conduct.

Respondents implicitly concede this fact. As they point out, leaders like General Powell who testified in support of the policy were concerned not with conduct but with the prospect of "'open homosexuality in [military] units'"—specifically, with the prospect that gays and lesbians might be able to "tell" and still continue to serve. Opp., 15 (quoting Gen. Powell's testimony); *see also Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Armed Servs. Comm.* 103d Cong., 2d Sess., 707-09 (1993) (Gen. Powell); 780, 821 (Gen. Otjen); 595-96 (Gen. Schwarzkopf). The record is unequivocal: military and Congressional leaders consistently explained the policy as necessary not to prevent sexual misconduct but rather to prevent the excitement of heterosexual prejudices. Indeed, as General Powell observed, the policy cannot be explained as conduct-based because the military already had other, adequate conduct regulations. *Id.*, 708.[9]

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[9] Because the policy is not conduct-based but rather targets speech and sexual orientation, it is subject to heightened scrutiny. *See* Pet., 22-23. Virtually all prior cases that have declined to apply heightened scrutiny to laws based on sexual orientation have done so on the (usually faulty) premise that such laws are conduct-based. *See* Opp., 10 & n.4.

b. Moreover, the policy was not sewn from whole cloth when Congress enacted the Act in 1993. *See* C.A. App., 334-41, ¶¶ 5-31 (tracing policy's evolution); C.A. App., 261-72; 472-73, ¶ 23. The relevant history includes not only the recent events leading up to the Act, but also the policy's prior formulations and the broader social and military history within which it developed and from which it has emerged.[10] This history shows that, while a policy of excluding homosexuals from the armed forces has persisted since World War II, the rationales given to support it have changed over time, as each one put forward has, in turn, been discredited and abandoned. *See* C.A. App. at 472-83, ¶¶ 23-30, 38-45; *id.* at 262-72, ¶¶ 5-6, 12-27.[11] In short, the policy has both preceded and outlasted each of the "purposes" that has been proffered to explain it—a fact that suggests that the rationales themselves are pretextual and that the policy, in fact, is based on prejudice.[12]

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[10] A "sensitive inquiry" into the legislative history is required. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

[11] Prior, discredited rationales have included the arguments that gays and lesbians (a) have a mental illness or psychopathology; (b) are inherently weak or unfit for military service; (c) pose a national security risk and cannot be trusted; (d) are sexually promiscuous or predatory; and (e) promote ridicule and discourage recruits. Respondents have abandoned these arguments and now rely on "unit cohesion"—the most forthright admission to date that the policy is based on heterosexual antipathy.

[12] *See United States v. Virginia ("VMI")*, No. 94-1941, slip op. at 18 (U.S. June 26, 1996) ("a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"); *Arlington Heights*, 429 U.S. at 266-68; *see also Able*, 880 F. Supp. 968, 976-77 (E.D.N.Y. 1995) (policymakers' "chief concern was to draft legislation to insure that the enactment would survive judicial review"), *vacated and remanded*, 88 F.3d 1280 (2d Cir. 1996).

III. The Law Is in a State of Confusion that Warrants this Court's Intervention.

Respondents argue that the current state of the law weighs against granting the present petition for four reasons. They contend that: (1) the decision below is "persuasive" and "resolve[s] any uncertainty as to the validity of the challenged policy" (Opp., 20); (2) the Second Circuit's recent decision in *Able* is consistent with the decision below (*id.*, 18); (3) there is presently "no conflict among the circuits" (*id.*, 10); and (4) this Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), "does not cast doubt on the validity of [the Act]" (*id.*, 16). They are wrong on all four counts.

1. As we have shown, the curious three-way division of the court below, which respondents acknowledge, casts substantial doubt on the validity of the policy as a whole and the DoD Directive in particular, and refutes any suggestion that the court issued a clear and persuasive opinion.

2. Nor has the *Able* decision clarified the picture. In *Able*, the Second Circuit faced not only an appeal by the government but also a cross-appeal by the successful plaintiff service members, who argued that the district court—while correct in striking down the Act's "statements" provision (10 U.S.C. § 654(b)(2))—had erred in not also striking down its "acts" provision (10 U.S.C. § 654(b)(1)). The service members insisted that the same invidious prejudice infected both provisions of the Act.

The Second Circuit reversed the district court's invalidation of the "statements" provision but premised its holding "upon the same assumption that the district court made in its opinion: that the ban on homosexual acts found

in § 654(b)(1) is valid under the Constitution." 88 F.3d at 1300. The court then agreed with the cross-appellants that the validity of the "acts" provision was at issue and remanded for a resolution of that issue. *Id.* In so doing, it allowed a much broader-based challenge to the Act to proceed. To suggest that this holding is a "persuasive" and "certain" endorsement of the policy is simply not credible.

3. Respondents' argument that there is no clear conflict among the circuits is also unavailing. As we have shown, the decision below is directly at odds with the Ninth Circuit's holding in *Meinhold* (*see* Pet., 28-29). Moreover, although respondents have largely prevailed in *Thomasson*, *Able*, and *Richenberg*, these decisions have provided neither a consistent line of reasoning nor a clear rejection of the constitutional arguments petitioner advances.

4. Finally, and most importantly, respondents err in suggesting that the principles articulated in *Romer* have no application here. In *Romer*, this Court fulfilled its unique constitutional duty to strike down a popularly enacted, state constitutional provision where the terms of that provision and surrounding circumstances demonstrated that it was "born of animosity" toward gays and lesbians. *Romer*, slip op. at 13. Nothing in *Romer* or any other decision of this Court suggests that such invidious discrimination may be tolerated, provided that it occurs in the military context. *Compare* Opp., 17-18.

Indeed, shortly after *Romer*, and after the filing of the present petition, this Court again reaffirmed (ironically at the behest of the United States) that the Constitution will not tolerate discriminatory state action when the actual purpose for the discrimination is not the "benign" purpose that is proffered but an unjustified desire to disadvantage individuals (in that case, women) who plainly have the right

and abilities to perform the functions at issue (in that case, to be "citizen soldiers"). *VMI*, slip op. at 17-29, 40-41.

Here, respondents have discharged petitioner not on the basis of his actions but because of his honest statement that he is gay. Their proffered "unit cohesion" rationale makes plain that their policy is based not on conduct or any disabilities that petitioner may have but rather on the anticipated prejudice of heterosexuals.[13] In no other circumstance of which we are aware has this Court permitted the expulsion of such a concededly outstanding individual from government service on the basis of such improper concerns.

CONCLUSION

For the reasons set forth both here and in the petition, the petition for a writ of certiorari should be granted.

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[13] Respondents admit that homosexuality is not a disability, and there is undeniable evidence of invidious prejudice in their "unit cohesion" rationale. These two facts distinguish literally all of the cases and arguments on which they rely. *See* Opp., 12-14 & n.6; *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 588 n.32, 593 & n.40 (1979) (city's blanket refusal to hire former heroin addicts, who were present methadone users, did not violate equal protection; policy "d[id] not circumscribe a class of persons characterized by some unpopular trait or affiliation" and "d[id] not create or reflect any special likelihood of bias on the part of the ruling majority"); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979) (upholding mandatory retirement age based on reasonable presumption that advancing age may be disabling; plaintiffs did not argue that policy "burdens a suspect group or a fundamental interest" and did not offer any "reason to infer antipathy"); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 310-11, 314-16 (1976).

Respectfully submitted,

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